IN THE
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NO. 28254

E. I. duPONT deNEMOURS & COMPANY, INC.,
Plaintiff-Appellee

v.

ROLFE CHRISTOPHER AND GARY CHRISTOPHER,
Defendants-Appellants

Appeal from the United States District Court for
the Eastern District of Texas

BRIEF OF APPELLANTS, ROLFE AND GARY CHRISTOPHER

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DESIGNATION OF PARTIES

E. I. duPont deNemours & Company, Inc. instituted suit as plaintiff in the Eastern District of Texas, Beaumont Division. It will herein-

after be referred to as Dupont. Dupont is the Appellee.

Suit was for injunction and damages against Rolfe Christopher, a Beaumont photographer, and his son-employee, Gary Christopher. Gary actually took the photographs in question. They will hereinafter be referred to as Christophers. They are the Appellants.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This is an interlocutory appeal permitted under 28 U.S.C. §1292(b). The trial court granted permission as did this court. The appeal is from the trial court's order of June 5, 1969 (A. 224) as explained in the trial court's memorandum (A.226). Christophers' appeal presents this issue for review:

Christophers contend that the use of the public airspace for aerial photography is not an "improper means" of obtaining information about Dupont's business. If this is correct, the trial court erred in:

1. Holding that Dupont stated a cause of action by overruling Christophers' Motion for Summary Judgment and Motion to Dismiss for Failure to State a Claim upon which Relief Can Be Granted.

2. Restraining Christophers from taking and circulating aerial photographs of Dupont's Beaumont Works.

3. Ordering Christophers to disclose the identity and location of their clients who employed them to take the photographs.

STATEMENT OF THE CASE

Christophers are local photographers. Rolfe Christopher has been a commercial photographer for thirty-three years and employs two others on salary. Between March 5-15, 1969, Christopher was hired to take aerial photographs of "new construction" at the Dupont Beaumont Works (A. 49).

March 19, 1969, Gary Christopher chartered Clifton W. Gregory, a pilot, to fly his Piper J-3 Cub (A. 188). The total elapsed time of the flight was 42 minutes. Gary riding in the front photographed new construction at Dupont and while returning to the airport photographed an intersection on Cardinal Drive (A. 211).

Sixteen photographs were taken above Dupont at approximately 12:00 o'clock noon March 19 (A. 124). The negatives and prints have been delivered to and are now in the possession of Dupont (A. 168-169).

Arriving at the Dupont construction they circled the plant, flying in a clockwise motion in an elliptical pattern. The flight had permission from the Tower Control at the Jefferson County Airport (A. 194). This pilot had flown another photographer over the same area a week before (A. 195-196). Their course took them over a state highway, railroad track,

open prairie, a navigable river and the Dupont parking lot. The center of their ellipse was the construction area; the radius varied from 1000-2500 feet (A. 200, 149, 164). The plane's altitude varied from eight or nine to fifteen hundred feet sea level (A. 196). It was at no time less than 500 feet above any obstacle (A. 196, 197, 201, 210, 138, 139, 174).

The only area of Dupont's which they were above was the parking lot. The pilot saw one man and numerous automobiles.

The pilot testified this was not a congested area (A. 207). A congested area would be an area where if he had a power failure while flying, he would not be able to glide and land the plane without landing in the area (A.208). He swore that he did not violate any laws or applicable regulations (A. 209, 217). At no time did they take any action which might endanger person or property below (A. 174).

Prior to this the entire county has been mapped from the air several times and such a photograph is on display in a local bank (A.107-108). Christopher prior to this had photographed many of the industrial facilities from the air (A. 109). Much of this work is performed for attorneys or other clients on a confidential basis and the non-disclosure of his activities is directly related to the prosperity of his business (A. 110-111).

The color film was processed and printed by Majestic, a commercial finishing establishment. The black and white was processed and printed by Christopher. The prints were delivered to his client March 26.

In the meantime, on March 19 a Mr. Brook called Christopher and wanted to know the identity of his client. March 20 his client refused to allow Christopher to disclose this identity. March 27 an attorney for Dupont requested the same information which was refused at the client's request. March 28 the photographs were re-delivered to Christopher by an attorney (presumably attorney for the client), whereupon Christopher delivered them to his attorney (the undersigned). Christopher's attorney retained possession of the negatives and prints until they were delivered to Dupont's attorneys pursuant to the court's order of April 17, 1969. By said order the parties agreed to a restraining order prohibiting further photography of the Dupont Works and any circulation of the photographs.

Dupont examined Rolfe and Gary Christopher under oath April 22, 1969. They declined to give the identity and location of their client. May 2 Dupont filed a Motion to Compel Answer to these questions (A.19).

April 11 Christophers filed Motion to Dismiss because there was no allegation of a jurisdictional amount as required by Title 28 U.S.C. §1332 (A. 11). At the same time a Motion to Dismiss for Failure to State a Claim

Upon Which Relief Can Be Granted was filed (A. 11). May 26 Christophers filed Motion for Summary Judgment based upon the depositions and affidavits (A.213). Dupont countered with the affidavit of Frank Maderich, Technical Superintendent of Dupont (A. 219).

June 5, 1969, the Trial Court overruled the aforesaid motions of Christopher and sustained the motion of Dupont. Christophers were ordered to answer the questions concerning the identity and location of their client.

SUMMARY OF THE ARGUMENT

Christophers have a Constitutional right to use the public airspace for aerial photography. As a matter of law such is not an "unlawful means" of obtaining business information.

There is no evidence to raise any issue that the Christophers' aerial photography constituted an illegal appropriation of Dupont's trade secrets. So long as the flight itself is not violative of the government standards (basically regulated by the F.A.A.) the fact that a camera is used during the flight does not make this an illegal activity.

ARGUMENT

Neither side has found an authority directly on point and must assume

this is a case of first impression.

Christophers reason no one could question their right to fly over Dupont's "Methanol" plant and learn what they might by visual observation. There is a highway adjacent to the premises. Could Dupont complain if the Christophers observed and photographed from the public highway?

While the public airspace is a public highway for all, the uniqueness of this case lies in the use of photography. Christophers reason that photography is merely the substitution of a mechanical lens for the eye, and the preservation of the image on paper as opposed to the brain.

Dupont relies upon Restatement of Torts §759, which provides:

> "§759. Procuring Information by Improper Means
>
> "One who, for the purpose of advancing a rival business interest, procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information." (Emphasis Supplied)

The issue is whether - aerial photography is an "improper means" of obtaining trade secrets.

It has long been recognized that business information may be obtained by "fair means". Comment (g) to §757, Restatement of Torts, reads:

> "The actor is free to engage in any proper conduct for the very purpose of discovering the secret. So long as his conduct is proper, his purpose does not subject him to liability."

The tort lies solely in the wrongful conduct. Holding that the inventor of the Bofors anti-aircraft gun did not state a cause of action, the court stated:

> "The tort lies in the wrongful acquisition. But one who has lawfully acquired a trade secret may use it in any manner without liability unless he acquired it subject to a contractual limitation or restriction as to its use." Aktiebologet Bofors v. United States, 194 F. 2 145 (D.C. 1951) at p. 148.

See also Ferroline Corp. v. General Aniline & Film Corp., 207 F. 2d 912 (7th Cir. 1953) at p. 922; Speedry Chemical Products Inc. v. Carter's Ink Company, 306 F. 2 328 (2nd Cir. 1962). In the latter case, the court ordered:

> "Appellants Speedry and Rosenthal brought this action for an injunction against, and an accounting from, Carter's, asserting unfair competition and alleged disclosure of trade secrets by appellants and subsequent use of them by Carter's. While there are precedents in this field, each case turns upon its own facts. There are, however, some guideposts. The right independently to discover and use a secret was recognized in England as early as 1743. Gibblett v. Read, 9 Mod. 459. There is a 'property right' in trade secrets, which may be protected against those who acquire and use the knowledge thereof wrongfully. Ferroline v. General Aniline & Film Corp., 207 F. 2d 912 (7 Cir. 1953), cert. denied 347 U.S. 953, 74 S. Ct. 678, 98 L. Ed. 1098 (1954). However, the discoverer of such secrets has no exclusive right against another who uncovers the secret by fair means, or against those who acquire knowledge of it without a breach of contract or of a confidential relationship with the discoverer, American Dirigold Corp. v. Dirigold Metals Corp., 125 F. 2d 446 (6 Cir. 1942); Nims, Unfair Competition and Trade-Marks, 4th Ed. p. 418." (at p. 330, emphasis added).

It is the manner in which it is obtained that determines whether it is "fair means" or "improper means". Assuming the burden of negativing any cause of action, the following have been held improper means of obtaining information.

TRESPASS

No trespass was committed while photographing the "new construction" because at all times the airplane and camera were in the public airspace. No longer does ownership of the land extend to the periphery of the universe; this ancient doctrine was abolished by the United States Supreme Court in United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946). There navigable airspace (defined as airspace above the minimum safe altitudes of flight) was held to be a public highway. The navigable airspace which Congress has placed in the public domain is "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority." 49 U.S.C. §180.

All of the witnesses agree that the flight was at least 500 feet above obstacles and that the radius was more than 500 feet from the structures in question. Thus, all agree that the flight was in the public domain or public highway of the air. The Civil Aeronautics Authority in its general operating and flight rules has prescribed "minimum safe altitudes" in §91.79 which reads:

"(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure." (The entire section is Appendix A to this brief.)

There is no evidence of any danger or harrassment occasioned to persons or structures below. United States v. Causby, supra, is the strongest possible authority that there was no trespass committed in obtaining the aerial photographs. There is no distinction between that case and the instant one merely because a camera was used in the air-plane.

BREACH OF RIGHT OF PRIVACY

This Court in McCullagh v. Houston Chronicle Publishing Co., 211 F. 2d 4 (5th Cir. 1954), following Milner v. Red River Valley Pub. Co., Inc., 249 S.W. 2d 227 (Dallas 1952), held that Texas does not recognize a cause of action for breach of a "right of privacy".

> "The right of privacy as such not being recognized under the common law, as it existed when we adopted it, and our Legislature not having given such right by statute, no recovery can be had in Texas under the facts in this record. It may be noted that our Legislature has given a limited right of action under our libel statute, Art. 5430, V.T.S., for the publication of written or printed statements which blacken 'the memory of the dead.'" (at p. 229)

Furthermore the courts have universally held that a corporation does not have a cause of action for invasion of privacy since the action is

designed to protect feelings and sensibilities of human beings. Oasis Nite Club, Inc. v. Diebold, 261 F. Supp. 173 (D.C. Md. 1966). Ass'n. for Preservation of Freedom of Choice, Inc. v. Nation Co., 35 Misc. 2d 42, 228 N.Y. S. 2d 628; Assoc. for Preservation of Freedom of Choice, Inc. v. Emergency Civil Liberties Committee, 37 Misc. 2d 599, 236 N.Y.S. 2d 216.

BREACH OF CONFIDENTIAL RELATIONSHIP

The cases on "trade secrets" almost universally turn upon breach of trust or breach of confidential relationship. Speedry Chemical Products, Inc. v. Carter's Ink Company, 306 F. 2d 328 (2nd Cir. 1962) [contention defendant breached confidential relationship]; K & G Tool & Service Co., Inc. v. G. & G. Fishing Tool Service, et al, 158 Tex. 594, 314 S. W. 2d 782 (1958) [plaintiff and defendant had both a contractual and confidential relationship].

At the same time Texas recognizes the converse, that the acquisition of information which is not acquired during the course of a confidential relationship, is not actionable. Furr's, Inc. v. United Specialty Advertising Co., 338 S. W. 2d 762 (El Paso 1960, e. ref'd. n.r.e.).

There was no relationship whatsoever between Dupont and Christopher. Dupont itself has not contended there was any violation of a relationship, whether confidential or otherwise.

ILLEGALITY

The tort of interference with business relations by acquisition of "trade secrets" is founded in the illegality of the acquisition. Thus the obtaining of "trade secrets" by theft, wire tapping or espionage may be actionable. See 86 C.J.S., Torts §48 at page 972; Prosser on Torts, Chapter 23, Economic Relations, page 752; Restatement of Torts, Division 9, Interference with Business Relations, §757.

Neither Dupont's complaint, proof nor brief has ever alleged any theft, bribery or other breach of criminal law.

FRAUDULENT CONDUCT

The obtaining of information by a deliberate scheme to deceive or steal through fraudulent conduct is actionable. A typical case is Seismograph Service Corporation v. Offshore Raydist, 135 F. Supp. 342 (E.D. La. 1955).

Nowhere in the complaint, proof or brief has Dupont claimed such conduct on the part of the Christophers. To the contrary, there has been no deception whatsoever as is established by Dupont's own affidavit.

CONCLUSION

Christophers have made no secret of their conduct and freely admit taking the photographs in question, and have furnished the evidence thereof

to Dupont in the form of the photographs themselves. For the purpose of this appeal, they have not denied that the photographs may contain "trade secrets". The facts are developed to the fullest practical extent and the issue is solely whether aerial photography constitutes an illegal appropriation of "trade secrets".

The only conduct relied upon by Dupont as "improper means" is the use of the public airspace for aerial photography. Christopher submits that use of the public airspace is a basic right guaranteed him under the law as a citizen. It is respectfully submitted, that under the evidence, as a matter of law, the trial court erred in holding plaintiff stated a cause of action and in ordering Christophers to disclose the name of their client. Christophers respectfully pray that the order of the trial court be reversed with instructions to grant their motion for summary judgment and for such other relief in the premises as they may be justly entitled to receive.

Respectfully submitted,

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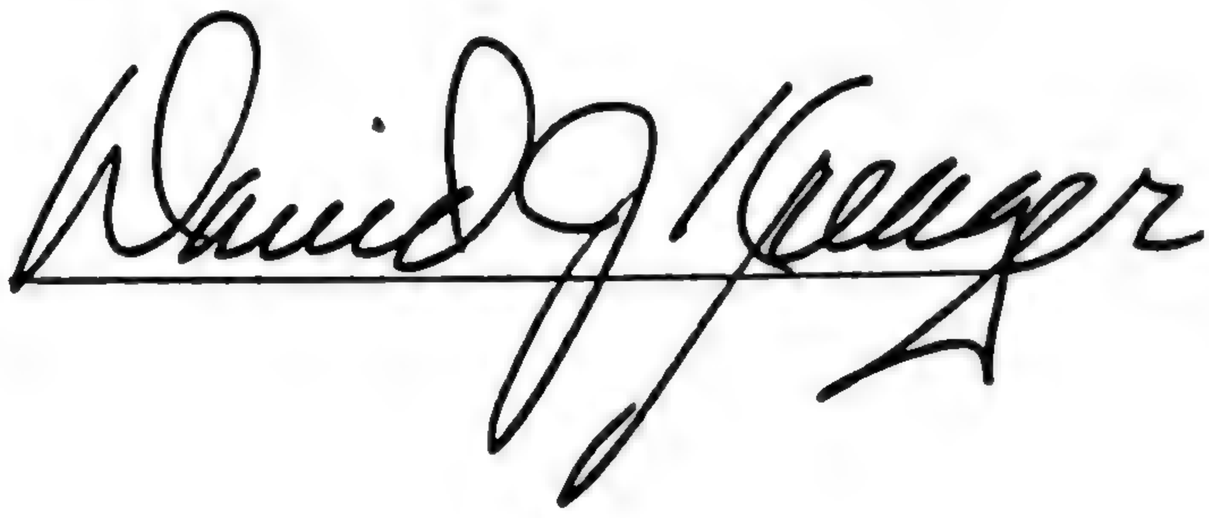
Attorneys for Rolfe Christopher and
Gary Christopher, Defendants-Appellants

By _____
Of Counsel

CERTIFICATE OF SERVICE

Two copies of the foregoing brief of Defendants-Appellants, Rolfe Christopher and Gary Christopher, were served upon Mr. Robert Q. Keith, Mehaffy, Weber, Keith & Gonsoulin, 1400 San Jacinto Building, Beaumont, Texas 77701, attorneys for Plaintiff-Appellee, Dupont, by mailing copies to said address on the 23rd day of October, 1969.



APPENDIX A

GENERAL OPERATING AND FLIGHT RULES

"§91.79 Minimum safe altitudes; general.

Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

(d) Helicopters. Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface. In addition, each person operating a helicopter shall comply with routes or altitudes specifically prescribed for helicopters by the Administrator."

Original

SIGNED COPY

IN THE

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FOR THE FIFTH CIRCUIT

* * * *

NO. 28254

* * * *

E. I. duPONT deNEMOURS & COMPANY, INC.,

Plaintiff-Appellee,

versus

ROLFE CHRISTOPHER, ET AL,

Defendants-Appellants.

* * * *

BRIEF FOR APPELLEE

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NO. 28254

* * * *

E. I. duPONT deNEMOURS & COMPANY, INC.,

Plaintiff-Appellee,

versus

ROLFE CHRISTOPHER, ET AL

Defendants-Appellants.

* * * *

BRIEF FOR APPELLEE

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the trial court correctly denied defendants' motion for summary judgment because:

   a. the pleadings state a cause of action;

   b. the proof reflects a genuine issue of material fact, i.e., "under the circumstances is aerial photography an improper means of acquiring duPont's trade secrets";

   c. discovery is incomplete.

2. Is aerial photography an "improper means" of acquiring a trade secret:

   a. By Christopher;
   b. By Christopher's principal.

3. Does Christopher's publication or disclosure of the trade secret give rise to a cause of action, independent of the method of acquisition.

4. Whether the District Court abused its discretion in compelling defendants to disclose upon oral deposition the "identity and location" of the person who hired them and to whom they delivered the photographs in question.

STATEMENT OF THE CASE

Appellee does not accept as accurate Appellants' "Statement of the Case" found upon pages 3 to 6 of their Brief.

This lawsuit arises out of the acquisition and publication of duPont's trade secrets relating to the manufacture of Methanol. (A. 1). This is an interlocutory appeal from an order directing further discovery and denying summary judgment. (A. 224).

The Christophers are commercial photographers. (A. 22). Du Pont had under construction a facility for the manufacture of Methanol, which embodies numerous "trade secrets" developed through extensive research (A. 219-223); a fact the Christophers do not contest, as conceded in their Brief, Page 13.

Because of duPont's care in protecting them, these secrets could only be discovered by aerial photographs taken

during construction (A. 219-223). So, acting for an undisclosed principal, the Christophers engaged an airplane and flew over duPont's plant site, photographing the area under construction (A. 23, 24, 140).

> The Christophers contend they were within the "public airspace" at the time of their photography mission, hence, were not employing "improper means" to appropriate the information sought. (Appellants' Brief, Page 2).

The evidence is conflicting as to whether or not they were even above the minimum prescribed altitudes at the time of the flight. They offer a general affidavit asserting the conclusion that they were. (A. 212-215). Du Pont counters with proof of the congestion (more than 1000 people working in a chemical plant upon 540 acres) and that they were violating the minimum altitude limitations by flying at 500 feet. (A. 221-223).

> As the pilot said, 'If the area was congested I violated Regulation 91.79(b) of the General Operating and Flight Rules of the FAA'. (A. 209).

Furthermore, the duPont plant site is within a five mile radius of the Jefferson County airport (A. 206-207), and within the "airport traffic area" (A. 210).[1/] Yet, there is

---

1/ "Airport traffic area" means, * * * that airspace within a horizontal radius of 5 statute miles from the geographical

nothing other than hearsay testimony that permission for this flight had been granted by the Tower Control at Jefferson County Airport (A. 193-194)[2]. Title 14, Chapter 1, Sec. 1.1, and Sec. 91.85, Code of Federal Regulations, prohibits such flight as made by Christopher without prior permission of "air traffic control." See Appendix hereto.

Whether the photographs were or were not taken from within the public airspace is subject to resolution upon final trial.

However, the proof is plain:

The Christophers were engaged to take aerial photographs of new construction at duPont's plant site (A. 60-61); the information sought could be obtained from no other source than flying over the plant site (A. 115; 90-94); before the mission over its construction site was complete, duPont was attempting to learn for whom and why the pictures were being made (A. 38-43); Christopher nevertheless declined to disclose the name of his principal (A. 43) and delivered the photographs to him (A. 43); the photographs contain information in the

1/Cont'd.
center of any airport at which a control tower is operating, extending from the surface up to but not including 2000 feet above the surface. Title 14, Chp. 1, Sec. 1.1, CFR.

2/ Christophers offer only hearsay proof of permission. This issue is still unresolved because all discovery proceedings have been stayed by the trial court pending this appeal. (A. 224-225).

nature of "trade secrets" of a value of multiple hundreds of thousands of dollars. (A. 219-223).

Christopher has taken duPont secrets, converted them to his own use and sold them for a profit. (A. 77-78). Neither he nor his principal could obtain the information sought from a public highway, nor by rail nor ship. The interrelation of parts in the process could not be divined from the ground; and after construction is complete, much of the data contained in the photographs will be hidden, even from aerial view, by other parts of the apparatus (A. 91-94; 222-223).

Christopher has declined to disclose for whom he took the photographs, or to whom he delivered them. (A. 96-97; 94; 78), simply because the principal does not want his identity disclosed (A. 94).

The record is still silent as to the use to which the photographs have been put. We do know:

[1] Christopher refused to answer the inquiry as to whether the principal was an individual or an employee of a major manufacturing firm . (A. 53; 62);

[2] Christopher does not know how many photographs were taken or delivered to his principal. (A. 25);

[3] The photographs were in the hands of the principal for two or three days (A. 29; 31);

[4] It takes only 15 to 20 minutes to make a clean reproduction of these photographic prints (A. 146); and

[5] The man who hired Christopher to take the photographs also is bearing the expense of this litigation. (A. 94-95). Christopher refused to identify him, but testified:

> "Q. Why don't you want to answer the question, Rolfe?
>
> "A. My client doesn't want me to reveal it.
>
> "Q. Is that the only reason, he doesn't want you to reveal his identity?
>
> "A. Yes, sir.
>
> "Q. You have no other reason whatsoever?
>
> "A. No other reason." (A. 52)
>
> * * * *
>
> "Q. I come back to the question again, other than, or besides the fact that your client does not want his name disclosed, you have no reason for not doing so?
>
> "A. No, sir.
>
> "Q. And if he would authorize it you would give it in a minute?
>
> "A. Yes, sir." (A. 94).

Pursuant to Rule 26(b), F.R.C.P., the trial court ordered the identity and location of the principal disclosed. (A. 224). From this and the denial of summary judgment defendants have perfected this interlocutory appeal.

ARGUMENT

Diversity of citizenship is the foundation of jurisdiction in this case. (A. 1). Under Texas law, one who has a secret process or formula has a property right therein which will be protected as against those who attempt to apply the secret to their own use. Brown v. Fowler, 316 S.W. 2d 111, 115 (Tex.Civ.App., 1958; Ref. NRE).

In Texas:

> "* * *the undoubted tendency of the law has been to recognize and enforce higher standards of commercial morality in the business world." Hyde Corp. v. Huffines, 314 S.W. 2d 763, 773 (Tex.Sup., 1958).

In Texas:

> "* * *A trade secret may be a discovery rather than an invention, and may result from industry or application, or may be fortuitous. It may be any secret of a party important to his interest. * * * The fact that it may be discovered by fair means does not deprive the owner of his right to protection from one who secures the knowledge by unfair means. The question is not, 'How could he have secured the knowledge?' but, 'How did he?'" Brown v. Fowler, 316 S.W. 2d 111, 114 (Tex.Civ.App.,1958; Ref. NRE)

The essence of the inquiry is stated in the Restatement of Torts, Sec. 759:

> "§759. Procuring Information by Improper Means
>
> "One who, for the purpose of advancing a rival business interest, procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information." (Emphasis Supplied)

"Improper Means" are characterized by the Restatement Commentators in general as:

> "* * *means which fall below the generally accepted standards of commercial morality and reasonable conduct." Comment (f), to Clause (a), Section 757, Restatement of Torts.

May aerial photography be an improper means of appropriating trade secrets? This is the ultimate legal question in the case. This is the issue the jury must ultimately determine.[3/] The test will be that articulated by Judge J. Skelly Wright in Seismograph Service Corp. v. Offshore Raydist, 135 F. Supp. 342, 354 (E.D., La., 1955), when he said:

> "* * *Courts are insisting on increasingly higher standards of commercial integrity. * * * Now business information or trade secrets, not rising to the stature of invention, are protected. * * *.
>
> "Even where it cannot be said that the parties stand in confidential relations, improper acquisition of another's business information or trade secrets subjects the perpetrator to liability * * *. * * *No single test can be applied in all cases where improper acquisition of business information is charged. The inventiveness of the devious mind staggers the imagination. It is simply the difference between right and wrong, honesty and dishonesty, which is the touchstone in an issue of this kind."

Du Pont has expended hundreds of thousands of dollars to develop the process which defendants and their undisclosed

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3/ Since defendants have not filed Answer in this case, no jury demand has been made.

principal have schemed to acquire. (A. 219-223). Whether to prevent unjust enrichment[4] or the fruits of "intrusion"[5] this Court must not permit the wrongdoer to profit at the hands of his victim.

Christopher could not go upon duPont property and appropriate the plans and drawings of this Methanol unit, for this would constitute a trespass and theft. So too, if he were to obtain such plans from a disloyal duPont employee. Cf. U.S. v. Lester, 282 F2d 750 (3rd. Cir., 1960).

Merely because they did not walk upon duPont's land, but by electronic or photographic means the same secret was surreptitiously expropriated, does not insulate "the perpetrator from liability."

As the Court of Appeals for the District of Columbia said in Drew Pearson v. Thomas J. Dodd, 410 F2d 701 (CA, D.C., 1969), cert. den'd. June 9, 1969, ___U.S.___, 23 L.Ed.2d 465:

> "Just as the Fourth Amendment has expanded to protect citizens from government intrusions where intrusion is not reasonably expected, so should tort law protect citizens from other citizens. The protection should not turn exclusively on the question of whether the intrusion involves a technical trespass under the law of property. The common law, like the Fourth Amendment, should 'protect people, not places'." (Emphasis Supplied)

4/ Meier Glass Co. v. Anchor Hocking Glass Corp., 95 F.Supp. 264, 268 (W.D., Penn., 1951).

5/ Prosser, Privacy, 48 Calif. L.Rev. 383, 389-392 (1960).

This is an area undergoing rapid social change.[6/] The law will adapt itself to the technological changes. A standard of conduct will persist whether the wrongful acquisition and appropriation stems from a physical trespass or a photographic excursion.

Without citation of authority Christophers claim a "Constitutional right to use the public airspace for aerial photography." (Brief, page 6)

They cite a repealed Statute (49 U.S.C. §180, Brief, page 9), and erroneously contend, "all agree that the flight was in the public domain or public highway of the air." (Brief, page 9).

First, they confuse a "right to transit" described by U.S. v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946), and defined by Congress. 49 U.S.C. 1304.

Second, they ignore that even the right to transit is circumscribed so that, dependent on circumstances, flight is prohibited below 2000, 1000 or 500 feet.

Third, contrary to their assertion that "all agree":

> [1] one witness says the flight was at 500 feet

(A. 221) over duPont's plant site, which contains towers of

6/ Cf. The New York Times Magazine, Section 6, June 8, 1969, "The Bugged Society", page 22; 14 UCLA Law Rev. 911, "Industrial Espionage: Piracy of Secret Scientific and Technical Information"; 9 The Practical Lawyer 87, "Some Legal Aspects of Industrial Espionage."

100 to 300 feet in height (A. 139), and a thousand people working (A. 223).

[2] another witness estimates the flight at 800 feet (A. 196), although there is no record of altitude (A. 191);

[3] while the pilot would opine the area was not "congested" he acknowledges flying over the plant site (A. 201-202) where there were parked "literally hundreds" of automobiles. (A. 203).

Even if navigable airspace is something of a neutral zone of industrial warfare, there exists in this case a real fact question as to whether the aircraft was in a permissible zone of transit when the photos were made.

In this case the jury must determine whether Christopher and his principal employed improper means to acquire the secrets of duPont. Subsidiary thereto are the fact issues of whether the aircraft was or was not in the"public airspace"[7/], and the damage sustained by duPont from this acquisition.

7/ In U.S. v. Causby, 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) it is noteworthy that the public airspace was described as a "public highway", not as a perch or haven for the surreptitious appropriation of trade secrets. The Court will note that while there is defined navigable airspace (49 U.S.C. 1301), the Congressional declaration enunciates for United States citizens only a "public right of freedom of transit" therein. 49 U.S.C. 1304. Nowhere do the Christophers even contend they are immune from liability because they were in transit; nor is there proof they are United States citizens.

By the application of any reasonable standard of business morality the means employed to ferret duPont's secret was improper. A cause of action exists, not only against the photographer, but against the principal who originated the idea, employed the photographer, studied (or had within his possession for study) the photographs, and financed this law-suit to preserve his anonymity (A. 94-95).

Du Pont has by verified petition brought suit seeking money damages and injunctive relief against further disclosure. Rule 26(b), F.R.C.P., specifically provides the deponent may be interrogated about "the identity and location of persons having knowledge of relevant facts."

Certainly the person who employed the photographer, and to whom the pictures were delivered has knowledge of relevant facts relating to: (a) what was done with the photo-graphs while he had them and before they were returned to Christopher; (b) were copies made; (c) to whom were copies delivered; (d) why were the photographs taken; (e) was there any person involved in sponsoring this photography mission; (f) who examined the pictures; (g) were enlargements made; (h) were measurements taken of certain items shown in the photos; (i) to whom was information given based on the pictures; (j) what information was given to others; and (k) were all photos returned to Christopher.

Manifestly it is within the power of the District Court to compel the disclosure sought by duPont; the information sought is directly relevant; and it is no answer to say, as did Christopher, that this Court should grant the appeal "because of the importance of confidence to his business and his client's demand that his identity not be disclosed."

[Christopher's Petition to this Court, Page 9]

This last argument was met and answered very recently by the Court of Appeals for the Third Circuit involving a non-party witness answering certain discovery interrogatories:

> "Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against the need for efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal appellate litigation. To accept the appellant's view is to invite the innundation of appellate dockets with what have heretofore been regarded as non-appealable matters. It would constitute the courts of appeals as second stage motion courts reviewing pretrial applications of all non-party witnesses alleging some damage because of the litigation." Borden Co. v. Sylk, (3rd. Cir., May 13, 1969, No. 17,592)

It is essential to an ultimate determination of this lawsuit to settle first the myriad of factual questions raised by the cited decisions.

With deference to this Court's admonition that "We do not believe it does any good to echo epithets uttered by others that §1292(b) is to be 'sparingly applied'* * *", [8/] we

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8/ Tokio Marine & Fire Ins. Co. v. Aetna Cas. & Surety Co., 322 F2d 113, 115 (5th. Cir., 1963)

must refer to virtually the only decision directly in point. Atlantic City Elec. Co-op. v. A. B. Chance, 313 F2d 431, 434 (2nd Cir., 1963) involved a discovery order in the electrical anti-trust cases. There the circuit denied the §1292(b) appeal, stating:

> "Questions of this sort, involving the discretion of the judge in conducting pre-trial discovery proceedings should not be reviewed by an appellate court at this stage of a litigation except where there has been a manifest abuse of discretion."

Defendants do not even contend the District Court abused its discretion in compelling discovery.

CONCLUSION

This is a matter of grave import to the business and scientific community. The District Court was mindful that the summary judgment rule "should be invoked cautiously to the end that parties may always be afforded a trial when there is a bona fide dispute of fact between them." Diplomat Electric, Inc. v. Westinghouse Elec. Supply Co., 378 F2d 377, 386 (C.A. 5, 1967).

The trial court correctly directed disclosure of the principal and denied summary judgment. His order should be affirmed.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A true copy of the above and foregoing Brief was hand delivered to Mr. David J. Kreager, counsel of record for the Appellants at the address shown upon the pleadings herein, upon the 24th day of November, 1969.

Robert Q. Keith

ROBERT Q. KEITH

APPENDIX

Title 14, Chp. 1, Sec. 1.1, C.F.R.:

"'Airport traffic area' means, unless otherwise specifically designated in Part 93, that airspace within a horizontal radius of 5 statute miles from the geographical center of any airport at which a control tower is operating extending from the surface up to, but not including, 2,000 feet above the surface."

Title 14, Chp. 1, Sec. 91.79, C.F.R.:

"§91.79 Minimum safe altitudes; general.

"Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:

"(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.

"(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

"(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure."

Title 14, Chp. 1, Sec. 91.85, C.F.R.:

"§91.85 Operating on or in the vicinity of an airport; general rules.

"(a) Unless otherwise required by Part 93 of this chapter, each person operating an aircraft on or in the vicinity of an airport shall comply with the requirements of this section and of §§91.87 and 91.89.

"(b) Unless otherwise authorized or required by ATC, no person may operate an aircraft within an airport traffic area except for the purpose of landing at or taking off from, an airport within that area. ATC authorizations may be given as individual approval of specific operations or may be contained in written agreements between airport users and the tower concerned."